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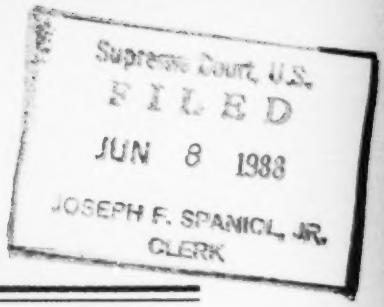

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT ANDERSON, JR., *et al.*,
Petitioners,

vs.

SLATTERY GROUP, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Does not ERISA's intent that trust principles be applied and ERISA's intent that information given to participant allow him to know where he stands, govern retirement benefit actions so that the drafters bear the burden to establish by objective and unequivocal evidence their intent that the duration of retirement group insurance benefits is transitory where the ERISA-mandated summary plan description states that such coverage for retirees will continue "for the remainder of your life"?

2. Does national labor policy require that a summary plan description mandated by ERISA, 29 U.S.C. §1022, be used to construe plan terms?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were:

1. The petitioners are listed in the appendix, page A68. They had been workers at the first named respondent's St. Louis plant. The district court certified petitioners to be representatives of a class consisting of some 453 hourly retirees of Alpha Portland Industries, Inc. who had been employed and retired from said respondent's nine plants situated in various parts of the United States.

2. The two principal respondents are: Alpha Portland Industries, Inc., a corporation, and Alpha Portland Industries, Inc. Insurance and Health Plan for Hourly Employees, an ERISA welfare benefits plan ("Alpha respondents"). Alpha Portland Industries, Inc. changed its name in 1985 to Slattery Group, Inc.

3. A third respondent is The Equitable Life Insurance Society of the United States. Its interest would be solely with respect to administration of a remedy if liability exists on the part of the principal respondents named above.

4. A fourth respondent under this Court's Rule 19.6 is the United States of America, which was permitted by the district court to intervene. Its interest in the outcome of the instant proceeding is similar to petitioners.

The United States filed a separate complaint against the Alpha respondents, asserting against such respondents a liability similar to that asserted by the petitioners. Its claim was bifurcated, to be heard only if there were a determination of liability on petitioners' claim.

5. The four remaining respondents are the International Brotherhood of Boilermakers, the Cement, Lime, Gypsum and Allied Workers Division of the International Brotherhood of Boilermakers, Charles F. Fuch and Charles C. Huntbach, all of whom were third-party defendants in the district court. The third-party action was also bifurcated by the district court and no adjudication has been entered. These respondents are not anticipated to have any interest in these proceedings.

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No.

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ROBERT ANDERSON, JR., *et al.*,
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vs.

ALPHA PORTLAND INDUSTRIES, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners Robert Anderson, Jr., et al, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on January 13, 1988. That judgment involves three important and recurring questions under the Employee Retirement Income Security Act of 1974 ("ERISA") and federal labor policy: (1) whether contract principles alone are to be considered in benefit actions; (2) when formal, complex plan language does not expressly address the duration of retirement benefits already commenced, who has and what are the proof burdens as to benefit longevity and how are the proof burdens to be met; and (3) what is the role of a Congressionally mandated summary plan description which unequivocally and in understandable terms informs that benefit coverage for retirees are to continue for life.

There are irreconcilable, diverse views among the circuits with respect to each of the questions posed. Retiree benefit issues are a matter of national concern. Review by this Court is urgently needed to guide the lower courts, to establish a uniform policy, and to reaffirm ERISA's intent that participants are to be protected in the information provided to them in Congressionally mandated form.

In the context of an eligibility determination by Section 408 fiduciaries this Court is now entertaining argument on the first question raised, limitation of benefit actions to contract principles. *The Firestone Tire & Rubber Co. v. Bruch,* No. 87-1054, 56 U.S. Law Week 3676 (1988). The issues in the instant case include but extend beyond the question whether a contract-only approach is correct.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 836 F.2d 1512 and is reprinted in the Appendix, page A1.[1]

The memorandum decision of the United States District Court for the Eastern District of Missouri (Hungate, D.J.) is reported at 647 F.Supp. 1109, and is reprinted in the Appendix, page A22.

JURISDICTION

Invoking federal jurisdiction under 29 U.S.C. §§1132(a) and 185(a), petitioners brought this suit in the Eastern District of Missouri. On September 30, 1986, the Eastern District after bench hearing, entered Findings of Fact and Conclusions of Law, finding in favor of the first three respondents herein, and

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[1] References to "A" pages are to the Appendices to this Petition. The Appendices are in a separate volume.

against petitioners, and dismissed petitioners' action. See page A21. It further entered an order under Rule 54(b), Federal Rules of Civil Procedure, finding that there was no just reason for delay of judgment against the petitioners and expressly directed the entry of judgment against petitioners, allowing appeal by petitioners to the United States Court of Appeals for the Eighth Circuit.

On petitioners' appeal, the United States Court of Appeals for the Eighth Circuit on January 13, 1988 entered a judgment and an opinion affirming the Eastern District's dismissal. See page A1. Petitioners filed a petition for rehearing with the Eighth Circuit. On March 14, 1988 the Eighth Circuit entered an order advising that it had considered the request for rehearing and denied it as well as petitioners' petition for rehearing by the panel. See page A62.

This petition is filed within 90 days of that March 14, 1988 ruling denying rehearing en banc and by the panel.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Statutes involved in this case are 29 U.S.C. §§1001(a) and (b) and 1022 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 *et seq.*, and 29 U.S.C. §185(a) of the National Labor Relations Act. Congressional disclosure and information concerns and purposes are set out in Section 2 of ERISA, 29 U.S.C. §§1001(a) and (b). Section 101 of ERISA, 29 U.S.C. §1021, imposes the framework for information requirements, and the next section, 102, *id* §1022, specifies what information is to be given participants and beneficiaries and exactly how it should be written. These statutory provisions and other relevant provisions of ERISA are set forth in the appendix. A63-A67.

STATEMENT OF THE CASE

Retirees of Alpha Portland Industries, Inc ("*Alpha*") brought this class-action suit to continue group life insurance and health benefits they started receiving upon retirement after individually fulfilling all conditions for the benefits. A24. The benefits were unilaterally terminated by Alpha upon the expiration of the union contract in 1982.

Prior to 1973 there was no formal plan, only booklets drafted by Alpha. Prior to 1965 Alpha's booklets advised that certain group insurance benefits would continue for those retiring, but retirees were required to share part of the cost. No specific reference to durational limits for those retirement benefits appeared.

In 1965 the union won Alpha's agreement that starting in 1966 retiree benefits would be cost free "until death of retiree." A4, A30. Alpha offered no testimony from any of its 1965 benefits negotiators, but it was allowed to offer testimony from other management that they understood the "until death" language was adopted with the intent to limit dependent coverage. A31, A12. Union negotiators testified they understood in 1965, and thereafter they assured workers before contract ratification votes as well as at other times, that retiree benefits were guaranteed for the duration of the retiree's life. A31, A59. The international union president published handbooks telling members of the 1965 cost-free "until death of retiree" agreement, assured there were "no subtractions" when he and Alpha's representative formalized a plan agreement in 1973 as part of the labor agreement, and his printed booklets boasted a bargaining history of only improvements. His handbooks made no mention that retirement benefits were terminable upon expiration of the labor agreement, nor did the handbook suggest the meaning Alpha's witnesses gave to the 1965 agreement.

The employer's plan administrators at its various cement plants located throughout the country, its plant management and its chief labor negotiator, historically assured workers that once retired, the benefits in issue continued for the rest of their lives. A59. The Eastern District viewed such testimony of oral statements as subject to "conflict," A57, but it did not resolve this factual conflict. A59. However, the Eastern District did find there was no question that ever since the mid-60's agreement providing retiree benefits be cost-free "until death of retiree," the Alpha's plan drafter and principal witness on contract meaning, wrote retirement letters using such terms as "lifetime" and advising of events that would occur long after the expiration of the labor agreement. A53-A54. It also found that in early 1978 Alpha distributed a summary plan description ("SPD") mandated by 29 U.S.C. §1022, advising retirees that such benefit "coverage will continue for the remainder of your life." A50-A51. The Eastern District characterized such documentation as "indicating that insurance benefits would continue for life." A59. With such information workers voted to ratify the labor agreements before they could become effective. The 1978 summary plan description was never later amended, corrected or modified.

The formal language the drafters agreed upon starting in 1973, called for continuation of retiree benefits, permitted amendments "hereinafter," coordinated benefits with Medicare and contained a plan-duration clause *void* of the words "terminate" and "benefits."

The Eastern District would consider the case only in terms of contract breach. It rejected consideration of all trust principles. A11. No Congressional purposes were considered since pensions were not involved. A55-A56. Recognizing that the formal plan terms were ambiguous, the Eastern District credited the trial testimony of the drafters, A15, A40, A56, that the drafters had actually intended retiree benefits expire with expiration of the collective bargaining agreement. A40, A56. This testimony

was admitted over objection and without a showing of timely communication. A31. The Eastern District cited *no unequivocal, objective* evidence of such intent existing at any time before the end of 1981 when Alpha made the decision to terminate its cement business and all retiree benefits. In deposition testimony offered by petitioners at trial, the drafters admitted that after agreeing on formal language in 1973, they had not prior to the time of that late-1981 decision, ever unequivocally told workers that their original and continuing anticipation was that retiree benefits terminate upon expiration of the labor agreement.

Although the Eastern District made no finding that workers were unequivocally told of any transitory intent by either the employer or union *before* the late-1981 decision, it allowed as evidence conduct by the union and employer that occurred after the decision was made by Alpha in late 1981 to terminate operations and retiree benefits. It considered as meaningful the union president's initial revelation of his intent in 1982 when Alpha was threatening to stop dues check-off and sell its remaining plants to anti-union bidders if the union did not accede to the termination of retiree benefits. Only then did the union president write to protesting retirees to explain why no challenge was intended by the union. The Eastern District looked to other union conduct then occurring. A51 ¶47, A53 ¶63, A59-A60.

The United States Court of Appeals for the Eighth Circuit agreed denial of welfare benefits creates only contract questions. A9. It accepted the Eastern District's finding of ambiguity in the formal plan terms, A11, to allow the court to consider the drafter's testimony of prior actual intent. A15. It would give no consideration to trust principles, nor consider the purpose of ERISA or whether ERISA requirements had been met. It held under law and custom that benefits for retirees expire with the expiration of the labor agreement, unless retirees *prove* the drafters actually intended the benefits were to last for the retiree's lifetime.

The court of appeals also held that petitioners' proof burden could not be met by the statements made in the Congressionally mandated summary plan description or by the history of either the prior oral and written statements by employer and union personnel which the Eastern District characterized as "indicating that insurance benefits would continue for life." The summary plan description was held "faulty" because it was inconsistent with the drafters' credited testimony of their prior actual intent. If "faulty," the court of appeals held the summary plan description was not to be used to construe the plan terms. A15.

That benefits continued during earlier strikes when there were no contracts, A53, the court of appeals rejected as objective evidence the benefits were not intended to be tied into the term of the labor agreement. A11. The court of appeals did not address petitioners' argument the trial court in its "four-corners" analysis must consider other provisions in the formal agreement that advised which benefits for retirees continued and which terminated with retirement, e.g., A50, and also article X of the labor agreement labeled "Employee Retirement Income Security Act of 1974," that specifically stated that the plan terms met ERISA requirements to tell "the circumstances under which the insurance terminates."

The court of appeals also held the summary plan description stating that the group insurance benefit coverage for retirees continued "for the remainder of your life," was not an enforceable plan document. Even on the limited contract breach question, the Eighth Circuit held the summary plan description need not be used by the trier to construe the ambiguous terms of the formal document or to derive intent absent a prior showing of worker *reliance* thereon. A17-A18. Such reliance could neither be inferred nor presumed even though the summary plan description had been issued to workers before they participated in ratification votes required by the labor agreements. Petitioners' testimony of assurances made at ratification meetings

and the actual provisions in the agreements requiring those ratification votes before the agreements were to become effective, were ignored.

Petitioners' petition for rehearing and rehearing en banc was denied, A62, and petitioners now seek review in this Court.

REASONS FOR GRANTING THE WRIT

Even before ERISA the circuits had taken a range of vastly diverse approaches to resolve questions of duration of retirement benefits. Although ERISA was designed to create a federal uniformity, uniformity has not been achieved in this area. Predictability of outcome remains totally dependent upon which forum is chosen. Only a ruling by this Court can create the uniformity that Congress intended to establish by enacting ERISA.

This case presents the conflict in its starkest form, not merely because one circuit calls another "illogical" and one circuit disagrees with others as to the effect of the summary plan description Congress mandated, but because the class of retirees come from plants in a number of different states, and had they filed suit in other circuits in which others of Alpha's plants were situated, they would have review by a court that takes a far different approach, views the summary plan description differently and construes substantially the same formal clauses to conflict with the Eighth Circuit's construction.

Moreover, practically every benefit plan in the country coordinates benefits with Medicare and contains amendment and duration-of-plan clauses. If the Eighth Circuit is correct that each such clause "is inconsistent with vesting," A15, there are essentially no retirees in this country entitled to continuance of group insurance benefits. Yet other circuits find the benefits are vested and order such benefits be continued.

The court of appeals decision not only goes far beyond that of any other circuit that has addressed the issues raised here, it contravenes the public policies Congress adopted in passing ERISA. By allowing testimony as to what was years-prior actual intent, also a violation of elemental hornbook contract principles, and by allowing that testimony to be used to give meaning to other equivocal, complex clauses and to render "faulty" and meaningless a Congressionally mandated document pro-

viding specified information in a specified way, the Eighth Circuit in effect abolished ERISA Section 102, 29 U.S.C. §1022, for welfare benefits and rejected Congressional intent that the individual participant, not the plan drafters, "know exactly where he stands" and be armed with enough information to enforce his/her own rights.

By its finding that the duration of benefits are by law and custom tied into the term of the labor agreement providing them, the court of appeals radically departed from the views of the other circuits as well as of this Court. If the Eighth Circuit is correct, that no matter what information the participant receives and no matter the format thereof, the benefit remains tied into the duration of the contract unless he can prove the *actual intent* is consistent with the information given him in Congressionally mandated form, the retiree is compelled to demand to continue his union membership to secure bargaining renewal of the benefit, swelling the ranks of many substantially depleted unions.

The holding is also a radical departure from other circuits and the views of this Court with respect to the relationship between retirees and their former union.

If the holding of the Eighth Circuit is permitted to stand, millions of retirees will be affected. The federal courts are already flooded with litigation in this area, and much more can be expected if years after the workers' retirement, their employers and unions are free to reverse their own unequivocal explanations given in summary plan descriptions and before ratification votes. The decision of the Eighth Circuit cries out for review and reversal by this Court.

I. A Split in the Circuits Now Exists

The reported cases reveal plan drafters ordinarily and historically use equivocal language to express the duration of retirement benefits. See, e.g., *Upholsterers Union v. American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967).

The circuits are now in disagreement with respect to what principles of construction are to be applied, and whether there are any federal policies to be served, in determining under what circumstances benefits become "vested" when the worker retires. In spite of the large number of prior decisions there still exists much confusion about what (1) standards are to be applied, (2) what is the appropriate relevant construction of plan amendment, benefit coordination and plan duration provisions, and (3) what principles are to be drawn from federal labor and ERISA policy.[2] Until the present decision one circuit had not openly criticized another. In the instant case the Eighth Circuit expressly characterized the Sixth Circuit's approach as "illogical" and accused it of being improperly "gratuitous."

The Sixth Circuit in *International Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), cert den'd 456 U.S. 1007 (1984), proposed in a contract-breach setting void of any summary plan description or other revealed employer explanation, that if the participant started receiving the retirement health benefit, the participant is relieved from the burden of showing a "clear manifestation of intent." *Id.* at 1481 n. 2. The Eighth Circuit always requires the retiree to bear the full burden on intent, A10, A11, rejecting the Sixth Circuit's explanation that under this Court's decision in *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181-182 (1971) (*"Chemical Workers"*), ordinarily participants are justified to

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[2] See, e.g., J. Vogel, *Until Death Do Us Part: Vesting of Retiree Insurance*, 9 Industrial Rel. L.J. No. 2 p. 183 (1987); Weckstein, *The Problematic Provision and Protection of Health and Welfare Benefits for Retirees*, 24 San Diego L. Rev. 101 (1987); Note, *Retiree Welfare Benefits: ERISA, LMRA and the Federal Common Law*, 20 Akron L. Rev. 455 (1987); L. R. Page, *Retiree Insurance Benefits: Enforcing Employer Obligations*, 4 Compensation and Benefits Management 19 (Autumn 1987); T. Barnes & C. Mishkind, *Retirees Health & Welfare Benefits: Controversy Over Their Duration*, 10 Employee Rel. L. J. 584 (1985).

anticipate retiree benefits would continue without the possibility of being adversely affected in the future by younger workers. Unless the language was unequivocal, the Sixth Circuit concluded "that the parties likely intended those benefits to continue." 716 F.2d at 1482. The Ninth Circuit expressly sides with the Sixth Circuit. *Bower v. Bunker Hill Corp.*, 725 F.2d 1221, 1225 (9th Cir. 1984). The Eighth Circuit finds this rationale "illogical," A10, and "gratuitous." A11. The Eighth Circuit's views would always give younger workers the say-so, finding retiree benefits are tied into the term of the labor agreement as a matter of law and custom.

The Eighth Circuit pronouncement that it is understood by custom and law, that benefits for retirees end with expiration of the current union agreement and are "tied to the agreement which created them," A14, A9,[3] conflicts with other circuits. See *District 17, United Mine Workers v. Allied Corp.*, 765 F.2d 412 (4th Cir. 1985) (damages for loss of health benefits extend into future under agreement which guaranteed benefits only "during the term of this agreement"); *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 5 (1st Cir. 1978), cert den'd 440 U.S. 913 (1979) (earned benefit continues beyond contract expiration and regardless of clause that expressly permits plan discontinuation).

Apart from the meaning to be given to this Court's decision in *Chemical Workers, supra,* whether this Court would accept the Eighth Circuit's view that benefits are understood by law and custom to expire with the expiration of the labor agreement, is questionable. E.g., *John Wiley & Sons v. Livingston*, 376 U.S. 543, 550-51 at n.9 (1966) (union's claims to severance

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[3] The Eighth Circuit's citation to the evidence on this, A7, comes from the Eastern District's acceptance of the testimony of a non-enrolled ERISA actuary on what was "customary practice in the industry." A54 ¶58.

pay benefits following contract expiration held arbitrable); *Nolde Bros., Inc. v. Bakery Workers Local 348*, 430 U.S. 243 (1977) (severance pay benefit claim after contract expiration arbitrable). See also *Steelworkers v. Canron, Inc.*, 580 F.2d 77 (3rd Cir. 1978) (dispute whether retiree health benefits continue after contract expiration, is arbitrable). Reported arbitration decisions reveal labor arbitrators do not find the retirement benefit to be tied into the term of the labor agreement. E.g., *In the Matter of the Arbitration Between United Steelworkders of America, AFL-CIO and Whitehead and Kales, Division of Johnston Group, Inc.*, 7 EBC 1013 (1986); *Black, Sivalls & Bryson, Inc. and Tec Tank, Inc.*, 81-1 ARB ¶ 8277 (1980); *Roxbury Carpet Company*, 73-2 Arb ¶8521 (1973); *American Standard, Inc.*, 57 L.A. 598 (1971). Thus there is a substantial body of law in direct conflict with the court of appeals' premise that by law and custom retirement benefits expire when the labor agreement ends.

To the extent the Eighth Circuit believed that the Sixth Circuit later retreated, A10, it should be noted that in that case the Sixth Circuit Court of Appeals held that the retirees should still be successful. *International Union, UAW v. Cadillac Malleable Iron Co.*, 728 F.2d 807, 808-10 (6th Cir. 1984) (even lack of legal presumption of lifetime intent based on retirement status, suggests no error in district court finding "the inherent duration of the retirement status beyond any particular contract" supported conclusion the parties intended for the benefits to continue for the life of the retiree). See also *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 616 (6th Cir.1985); *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669 (6th Cir. 1985).

The split between the Sixth and Eighth Circuits on contract breach proof burdens, on the meaning of plan terms,[4] on

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[4] Examples of conflict in the meaning of similar plan terms are presented infra pp. 17-18.

evidence, and on inferences and presumptions, is further pronounced if the instant case is considered in terms of what are the legal duties of the drafters imposed by ERISA and the Congressional concerns that led to enactment of far stronger information provisions than ever before known to the law. In the Sixth Circuit cases there was no summary plan description containing terms similar to that present in the instant case.

Congress prescribed exactly what information was to be given and how. *Teamsters Local 705 v. Daniel,* 439 U.S. 551, 569-70 (1979) ("ERISA fills the regulatory void," requiring disclosure of "specified information to employees in a specified manner"). Congress recognized "a need for more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan — what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits." S.Rep. No. 93-127, 93rd Cong. 1st Sess. 27 (1973), reprinted in 1974 U.S. Code Cong. & Admn. News 4838, 4863. To carry this purpose out, Congress mandated the summary plan description "shall be written in a manner calculated to be understood by the average plan participant" and the SPD was to state the "circumstances which may result in . . . denial or loss of benefits." 29 U.S.C. §1022.

The Eighth Circuit appears to conclude that these ERISA protections have applicability only to pensions, A8-A9, but the Department of Labor's position has been that the statutory obligation of disclosure of circumstances leading to loss applies to retiree welfare benefits every bit as much as to pensions. ERISA Technical Release 84-1, reported in CCH *Pension Plan*

Guide ¶ 23,653H.[5] See also *Bower v. Bunker Hill Corp., supra,* 725 F.2d at 1225 (Court must consider what ERISA mandates and DOL requires in summary plan description). In the face of the Eastern District's finding that the documentation Congress mandated "indicat[ed] that the insurance benefits would continue for life," A59, the Eighth Circuit's demand that the drafter's actual intent, even if never clearly and unequivocally disclosed in a timely manner, is relevant and must be proved by retirees to be consistent with the summary plan description, rejects Congressional purpose as well as the views of the Sixth and other circuits.

II. Need Exists for Uniformity Under Single Federal Law

Not merely because a large part of the class of retirees comes from Alpha's plants in the Sixth Circuit and elsewhere outside the Eighth Circuit, but the split in the circuits and the differing

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[5] The release by DOL's Office of Pension and Welfare Benefit Programs provides in part

> . . . termination is a circumstance which may result in the denial or loss of benefits that a participant or beneficiary might otherwise reasonably expect to be provided under a plan and, therefore, pursuant to section 102 and §§2520.102-2 and 2520.102-3(1), a summary plan description must include information concerning the provisions of the plan which relate to the termination of the plan. In this regard, the Department interprets the provisions of section 102 and §§2520.102-2 and 2520.102.3(1) to require that the summary plan description include, in addition to other relevant information, a summary of any plan provisions governing the rights of the plan sponsor or others to terminate the plan, and the circumstances, if any, under which the plan may be terminated; a summary of any plan provisions governing the benefits, rights and obligations of participants and beneficiaries under the plan on termination of the plan.

The cited regulations are entitled to great deference. *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984).

approaches, makes the issue presented especially compelling for resolution by this Court. Only recently this Court granted review in *Firestone Tire & Rubber Co. v. Bruch, supra,* to resolve a split in the circuits as to approach on benefit eligibility questions, the resolution of which will turn on ERISA intent. ERISA intent is the issue in the instant case and would lead to resolution of the differences in the circuits.

The divergence in the circuits gives reason to Congress' decision to preempt benefit issues to secure a single, uniform approach, even on welfare benefits. *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 210-11 (1985) ("the policies that animate §301 . . . require that 'the relationships created by [a collective bargaining] agreement' be defined by application of 'an evolving federal common law grounded in national labor policy.' ") Years ago this Court noted that the federal courts fashion substantive law "from the policy of our national labor laws," to be "solved by looking at the policy of the legislation in fashioning a remedy that will effectuate that policy." It called for "judicial inventiveness" to "be determined by the nature of the problem." *Textile Workers v. Lincoln Mills of Alabama,* 353 U.S. 448, 456-57 (1957). This demand for uniformity is just as strong under ERISA.

Thus, this Court recognized in *Pilot Life Ins. Co. v. Dedeaux,* ____ U.S. ____, 107 S.Ct. 1549, 1557-58 (1987) ("*Pilot Life*"), that "Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare plans," heavily stressing the demand for a single federal common law. In *Pilot Life* this Court said that Congress intended there be "uniformity of decisions" so that participants, administrators and fiduciaries all could make *predictions with respect to future actions.* 107 S.Ct. at 1557.

The Eighth Circuit's requirement that participants *prove* that the summary plan description and other objective explanations the participants are given over the years are consistent with the

actual private intent of the drafters as to vesting, A15, allows participants to make no predictions on a matter of major importance to them. *United Steelworkers of America v. Textron, Inc.*, 836 F.2d 6, 8 (1st Cir. 1987). It defies Congress' determination that participants be armed with sufficient information about their own rights. S.Rep. No. 93-127, 93rd Cong. 1st Sess. 27 (1973), reprinted in 1974 U.S. Code Cong. & Admn. News 4838, 4863.

Lack of uniformity to make predictions exists when circuits disagree on meaning of similar provisions and SPD is unavailable as construction and intent tool

When the formal terms of the agreement are complex and do not expressly state that retirement benefits expire when the labor agreement expires, predictability based on similar formal provisions, varies from circuit to circuit. For example, the Eighth Circuit in the instant case interprets a plan duration provision as supporting a privately held intent the benefit be transitory. A14. Other circuits disagree. *E.g., Hoefel v. Atlas Tack Corp., supra,* 581 F.2d at 5 (earned benefit continues beyond contract expiration regardless of clause that permits plan discontinuation); *Weimer v. Kurz-Kasch, Inc., supra,* 773 F.2d at 675-76 (continuation and duration clauses are directed to cover rights of then active employees, not retirees). *Cf. Ft. Halifax Packing Co. v. Coyne,* 107 S.Ct. 2211, 2216 (1987) (Congress does not view the terms "plan" and "benefits" as synonymous). The Eighth Circuit holds a duration-of-*plan* provision applies to all benefits as well.[6] See A14.

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[6] The Eighth Circuit thus finds statements made in benefit booklets issued between 1955 and 1959, calling for the Group Insurance *Program* to continue to the date specified for termination of the collective bargaining agreement, as, e.g., A26 ¶14, A27 ¶15, as statements that should be read *as if* stating "all benefits, including those for retirees, are limited to the duration of the agreement." A-3, A-13. Such unequivocal phraseology nowhere appears.

Nor is there uniformity amongst the circuits for prediction when a provision anticipating amendment means the benefit is transitory in the Eighth Circuit,[7] but in the Sixth Circuit a similar clause is found only to suggest anticipation for *later improvements. International Union, UAW v. Cadillac Malleable Iron Co.*, 3 EBC 1369, 1376 (WD Mich. 1982), aff'd 728 F.2d 807, 809 (6th Cir. 1984). Nor can there be uniformity for prediction when the Eighth Circuit gives no meaning to other clauses in the formal agreement between Alpha and the union that specify which benefits end on retirement and which continue after retirement and a provision expressly stating that the agreement specifically tells when benefits terminate if they do, while the Sixth Circuit suggests such clauses have meaning in a four-corners contract approach. *International Union, UAW v. Yard-Man, Inc., supra,* 716 F.2d at 1480.

Nor is there uniformity for prediction from objective manifestations, when in the Ninth Circuit payments of benefits during a strike is meaningful evidence the benefit was not tied into the term of expired collective bargaining agreement, *Bower v. Bunker Hill Corp., supra,* 725 F.2d at 1225, but in the Eighth Circuit payments for benefits during a strike when the labor contract has expired, are meaningless on the issue whether the

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[7] The Eighth Circuit asserts it is supported by the Third Circuit, A14, *Struble v. New Jersey Brewery Employees Welfare Trust Fund,* 732 F.2d 325, 330 n. 3 (3rd Cir. 1984), in which the labor agreement contained an unequivocal provision expressly allowing the cessation of the employer's obligation occurs if "no longer required by a Collective Bargaining Agreement." *Ibid. No* such similar provision appears in Alpha's agreement. The Third Circuit noted the SPD advised the benefits would terminate if the contributions ended, and found the SPD "relevant." 732 F.2d at 331. The Third Circuit, in conflict with the Eighth Circuit, was at least willing to analyze the evidence to see if "plaintiffs could have reasonably believed that a promise of lifetime benefits had been made." *Ibid.* The Eighth Circuit is unconcerned with the participants' "reasonable beliefs"; its only concern is the drafters' actual intent.

benefit is by law and custom tied into the term of the expired agreement.[8]

The Eighth Circuit views as evidence that the parties intended duration limitation for retirees, a long prior (pre-*Chemical Workers*) 1966 negotiation of a coordination of benefits ("COB") clause when Medicare became effective. After enactment of Medicare practically every plan provided for such coordination, and yet the COB clause has not been viewed as a manifestation of an intent to limit duration in any of the other reported cases. If the Eighth Circuit's acceptance that a Medicare coordination provision means lack of vesting intent, practically every group insurance plan precludes retirees from anticipating lifetime continuation no matter what information is given the retiree.

Review would present limited question; meaning of terms found ambiguous need not necessarily be determined if review is granted

Petitioners do not propose by granting review this Court is required to address the meaning of any particular formal clause in the labor agreement or whether such complex phraseology can be "understood by the average plan participant," for the Eastern District determined in the instant case that the provisions are sufficiently ambiguous as to allow parol evidence.

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[8] The Eighth Circuit suggests *Bower v. Bunker Hill Corp., supra,* has no applicability if during the strike the employer also continues benefits to active workers. A-13 n. 3. The Ninth Circuit in *Bower,* said "Thus when insurance benefits are provided during a strike, those benefits are probably not tied to the term of a labor-management agreement." 725 F.2d at 1225.

Such ambiguity in the formal clauses is accepted *arguendo* by petitioners in asking this Court for review.[9]

That *ambiguity* finding which the court of appeals did not set aside, allows this Court to limit its consideration to two questions:

> (1) First, whether on a benefit breach claim under ERISA, the Congressionally mandated summary plan description clearly stating coverage will continue "for the remainder of your life," must be given consideration for construction; and
>
> (2) In the presence of such explanatory statements of lifetime coverage in a Congressionally mandated document, before durational limitation can be found should the drafters have the burden of showing by *objective, unequivocal* evidence *timely* revealed to participants and beneficiaries, that retiree benefits were intended to expire with expiration of the union agreement.

Question is presented as to use of Summary Plan Description as interpretive document

The question presented is not necessarily one of *binding* the employer by its summary plan description, albeit on this issue

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[9] Both the House and Senate Labor Committees' reports on ERISA state

> "Subcommittee findings were abundant in establishing that an average plan participant, even where he has been furnished an explanation of his plan's provisions, often cannot comprehend them because of the technicalities and complexities of the language used."

S.Rep. 93-129, at 11, 1 ERISA Leg. Hist. 597 and H.R. Rep. 93-533 at 8, 2 ERISA Leg. Hist. 2355. Thus the ERISA requirement that what is written be "calculated to be understood by the average plan participant." 29 U.S.C. §1022. Petitioners' educational level averaged at the fifth grade.

the Eighth Circuit clearly disagrees with the Eleventh. *McKnight v. Southern Life & Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985) (in the event of conflict between plan terms and SPD, latter would prevail). In light of the strong ERISA disclosure requirements that workers ought to know and be told clearly,[10] the question petitioners present can be limited to whether federal labor policy under ERISA requires that before the lower court can render a summary plan description unusable for contract interpretation, the drafters have the burden of showing a contrary meaning by *objective, unequivocal* and *timely* revealed evidence.

The Eighth Circuit holds if the summary plan description is inconsistent with the drafters' actual intent as principally derived from their testimony, the summary plan description is meaningless as a tool for construction absent direct evidence that the workers in some manner other than voting for ratification of the labor agreement, *relied* on summary plan description. The Eighth Circuit would not even allow the summary plan description to substitute for what it views as the Sixth Circuit's "gratuitous inference" of intent.

Apart from the necessity of examining Congressional intent behind its information demands a review by this Court would entail, no hornbook law suggests that in a contract breach action, that whether a second document is to be used for contract *construction* should turn on the *reliance* of the other contracting party. There are in commercial contract breach actions an abundance of considerations and rules covering the use of later issued documents for construction, but reliance is *not* included in any of them. See 4 *Williston on Contracts* §629 at 916, §622 at 779-80, §623 at 816 (3rd edn).

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[10] *Genter v. Acme Scale & Supply Co.*, 776 F.2d 1180, 1186 (3rd Cir. 1985) ("it is the employee's right to be informed of his rights, however, rather than the wisdom of the employee's decision concerning these rights that [ERISA] was intended to protect").

Question is presented whether unequivocal, objective evidence is required to allow testimony of prior actual intent

Reason exists for this Court to use review of this case to examine whether unequivocal, objective and timely evidence should be required of the plan drafters before there can be a finding that a never-corrected Congressionally mandated summary plan description is "faulty" and unusable. The Eighth Circuit allows testimony of the drafters to establish actual intent and to give "fault" to the SPD. In other ERISA contract contests the Seventh Circuit stated it will not allow actual intent to dominate, no matter how credible be the testimony on intent. *Robbins v. Lynch,* 836 F.2d 330, 332 (7th Cir. 1988) ("undisclosed intent is not material"). See also *Kemmis v. McGoldrick,* 706 F.2d 993, 996-97 (9th Cir. 1983) (under federal labor law testimony of witnesses as to their understanding as to ambiguous terms held improper; "judicial recognition of such oral statements invites collusion and controversy to the detriment of the employee beneficiaries"). The Eighth Circuit is in direct conflict with these views.

Also in conflict with the Eighth Circuit, the Sixth Circuit stresses "objective manifestations of a party's intent." *International Union, UAW v. Cadillac Malleable Iron Co., supra,* 3 EBC 1369, 1375, aff'd 728 F.2d 807, 809 (6th Cir. 1984). See also *Bower v. Bunker Hill Corp., supra,* 725 F.2d at 1224 ("we look to extrinsic evidence" and not parol evidence). These cases are consistent with hornbook commercial contract law that testimony of what was one's prior actual intent is improper. 4 *Williston on Contracts* §611 at 556, §606 at 375, §612 at 577-78 (3rd edn). The Eighth Circuit disagrees.

If the information purposes of ERISA, 29 U.S.C. §1001(a) and (b), establish or add to a federal labor policy, then there is compelling reason to consider whether the appropriate balance under federal substantive law requires objective, unequivocal and timely evidence before testimony of actual intent can be of-

fered and before the summary plan description can be ignored and called "faulty."

This Court has held in other contexts that a burden falls on the drafters to use unequivocal language if the employer's periodic obligations to fund group insurance benefits is to be limited. *Lewis v. Benedict Coal Corp.*, 361 U.s. 459, 469-70 (1960) (duty to use unequivocal language if the employer's obligations to make contributions to fund retirement benefits were to be excused notwithstanding contract clause expressly conditioning employer's performance under contract on union's not striking). In *Schneider Moving & Storage Co. v. Robbins,* 466 U.S. 364, 372-74 (1984), this Court similarly imposed an obligation on the drafting parties to use unequivocal language if they intended to impose the contractual grievance procedure on the plan trustees. This Court also recognized in *Schneider,* that the union might at the time of controversy side with the employer for reasons of its own, *ibid,* which is significant in considering whether the objective manifestations must occur before the decision is made to terminate.[11]

Phrasing the issue in only a slightly different way, the First Circuit in *United Steelworkers of America v. Textron, Inc., supra,* 836 F.2d at 9, said that one element for consideration would be whether the employer had *failed* to advise employees of the terminability of their health insurance. (Emphasis supplied) The Ninth Circuit may agree. *Bower v. Bunker Hill Corp., supra,* 725 F.2d at 1225 ("arguably inadequate disclaimers in the Summary Plan Description"). The Eighth Circuit clearly disagrees that any meaning can be drawn from respondents' failure to timely explain terminability. Having rejected as meaningful the explanatory and summary plan

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[11] It is hornbook contract law that the trier is to look to the construction *objectively* placed on the contract *before* the controversy arises. 4 *Williston on Contracts* §623 at 811-12 (3rd edn).

description statements that drafters gave to the workers that the Eastern District found would lead workers to believe that benefits would continue for the retiree's lifetime, the Eighth Circuit would find the drafters' failure to be unequivocal in their formal language and failure to even mention terminability in the SPD, to be totally irrelevant. It would appear the Eighth Circuit suggests that to impose on the drafters a burden of using unequivocal language or to show other timely, objective, unequivocal evidence of their intent to limit duration, would compel the drafters to prove a negative intent. Petitioners would submit not. It would merely compel drafters to meet Congressional intent behind those information requirements Congress imposed in 1974 in enacting ERISA.

III. Resolution Will Have Broad Economic Impact On Government, on Employers and on Union Members

The number of cases on the issue of the duration/terminability of retiree group insurance benefits is legion. Note 2 supra p. 11. They are not diminishing. With health care costs spiraling this decade more than ever, and with the number of employers continuing to find themselves faced with greater at-home retiree benefit costs with the worker base going overseas or otherwise lost, it must be anticipated that there will be a steady increase in the number of retirement benefits cases filed absent resolution by this Court. The issue is one that will have great economic impact on state and federal government welfare and aid processes, as witness the complaint in intervention filed by the United States of America in this very case.

The issue clearly affects the business community. J. Neelson, *Sick Retirees Could Kill Your Company*, Fortune Magazine 3/2/87 pp. 98-99. That community would likely prefer this Court resolve the split in the circuits by rejecting the Sixth Circuit and require all circuits impose the proof-of-drafters'-actual-intent burden on retirees in the manner of the Eighth Circuit.

The issue also affects the membership growth of unions to whom the Eighth Circuit gives whatever "control" there is, to the retirees' benefit destiny. Under the Eighth Circuit decision retirees are forced to recognize that no matter what their employer and union inform them about duration, never knowing what will be their testimony as to actual intent until after termination is attempted, they had better remain union members and pay full dues even after retirement, all in the hope that the union will bargain each time a continuation-of-benefits provision. Absent that, according to the Eighth Circuit, the benefits expire. The Eighth Circuit decision provides strong inducement for retirees to assume "voluntary" membership and augment organized labor's presently diminished ranks. Such an inducement was thought lost years ago by this Court's decision in *Chemical Workers, supra.*

This issue clearly affects an aging population that is rapidly increasing nationwide. The First Circuit recognized as "general facts"

> (1) most retired union members are not rich, (2) most live on fixed incomes, (3) many will get sick and need medical care, (4) medical care is expensive, (5) medical insurance is, therefore, a necessity, and (6) some retired workers may find it difficult to obtain medical insurance on their own while others can pay for it only out of money that they need for other necessities of life.

United Steelworkers of America v. Textron, Inc., supra, 836 F.2d at 8.

CONCLUSION

This case is appropriate for this Court to now address the questions presented. All disputed facts required for review of the questions presented, have been resolved by the Eastern District's findings. For all the reasons stated above it is respectfully submitted that this Petition for Certiorari should be granted.

Respectfully submitted,

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